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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 ANDREW SHALABY and SONIA DUNN-RUIZ,  
12 Plaintiffs,  
13 v.  
14 IRWIN INDUSTRIAL TOOL COMPANY, et al.,  
15 Defendants.  
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Case No.: 07cv2107-MMA (BLM)

**ORDER:**

**(1) DENYING MOTION TO TERMINATE  
PROTECTIVE ORDER**

**(2) GRANTING DEFENDANTS' MOTION  
TO FILE DOCUMENTS UNDER SEAL**

**(3) GRANTING PLAINTIFFS' MOTION  
TO FILE DOCUMENTS UNDER SEAL**

**(4) MODIFYING THE PROTECTIVE  
ORDER**

**[ECF Nos. 278, 282, 288]**

23 Currently before the Court are Plaintiff Andrew Shalaby's October 25, 2017 motion to  
24 terminate the Protective Order [ECF No. 278-1 ("Motion")]; Defendant Worthington Industries,  
25 Inc.'s November 27, 2017 motion to file documents under seal [ECF No. 282]; and Plaintiff's  
26 December 10, 2017 motion to file documents under seal [ECF No. 288]. Defendant filed a  
27 response in opposition to the motion to terminate the Protective Order on  
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1 November 27, 2017 ("Opposition").<sup>1</sup> ECF No. 281 ("Oppo."). In reply to the Opposition, Plaintiff  
2 filed a declaration on December 9, 2017 [ECF No. 286], a supplemental declaration on  
3 December 10, 2017 [ECF No. 287], and a notice of errata on the supplemental declaration on  
4 December 10, 2017 [ECF No. 289].

5 For the reasons set forth below, the Court **DENIES** Plaintiff's motion to terminate the  
6 Protective Order; **GRANTS** Defendant's motion to file documents under seal; **GRANTS** Plaintiff's  
7 motion to file documents under seal; and **ORDERS** modification of the Protective Order.

8 **I. BACKGROUND**

9 The original Complaint for the instant matter was filed in Alameda County Superior Court  
10 of the State of California by Andrew Shalaby and Sonia Dunn-Ruiz (collectively "Plaintiffs")  
11 against Newell Rubbermaid, Inc. ("Newell") and The Home Depot, Inc. ("Home Depot") for  
12 injuries allegedly caused by a gas torch product and fuel cylinder. See ECF No. 1 at 1-2. After  
13 it was removed to the United States District Court for the Northern District of California, Plaintiffs  
14 filed an Amended Complaint against Irwin Industrial Tool Company, Inc. ("Irwin") and Home  
15 Depot.<sup>2</sup> Id. at 2. A stipulated Protective Order was entered by the court on February 27, 2007  
16 to protect the "proprietary and confidential information of the Defendant Bernzomatic, an  
17 unincorporated division of [Irwin]." ECF No. 1-1 at 14. On June 19, 2007, Defendant  
18 Bernzomatic filed third-party complaints against Western Industries, Inc. ("Western") and  
19 Worthington Industries ("Worthington"). See ECF No. 1 at 17. On October 30, 2007, the case  
20 was transferred to the United States District Court for the Southern District of California.  
21 ECF No. 1-4.

22 On January 16, 2008, the Honorable Thomas J. Whelan entered an order regarding the  
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25 <sup>1</sup> Of the defendants and third-party defendants in the now-closed case, only Worthington  
26 Industries, Inc. filed a response in opposition to the motion to terminate the Protective Order.  
27 See Docket; ECF No. 281; ECF No. 279 (ordering Plaintiff to serve all attorneys of record who  
28 had not been previously terminated in the case by U.S. Mail); ECF No. 280 (declaration of  
service).

<sup>2</sup> The Amended Complaint named Irwin as a defendant in place of Newell and described Irwin  
as a wholly owned subsidiary of Newell. ECF No. 1-2 at 27-28.

Protective Order, in which the parties stipulated that third party defendants Western and Worthington also would be parties to the original Protective Order and that proprietary and confidential information of Western and Worthington produced in the litigation or otherwise made available would be “preserved and maintained in accordance with the Protective Order.” ECF No. 10 at 1-3. The stipulation was signed by Richard A. Ergo or Cathleen S. Huang on behalf of Worthington, Lowell T. Carruth on behalf of Western, and Mark D. Epstein on behalf of Plaintiffs Shalaby and Sonia Dunn-Ruiz. Id. at 2-3. On July 28, 2009, the Honorable Michael M. Anello granted Defendants Irwin’s and Home Depot’s motion for summary judgment, and ordered the Clerk of Court to enter judgment in favor of Defendants and to terminate the case. ECF No. 209 at 25. In 2010, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court’s ruling. ECF No. 272 at 6.

## **II. MOTIONS TO FILE DOCUMENTS UNDER SEAL**

Defendant asks the Court to seal Exhibits J and K to the declaration of Jason J. Granskog, counsel for Defendant, in support of its Opposition. ECF No. 282. In support, Defendant claims that the documents contain trade secrets and confidential information, and that they were produced in discovery in the instant case, pursuant to a protective order. Id. at 1-2. In further support, Defendant notes that the documents are of a technical drawing containing text that identifies the drawing as confidential and “the sole property of Worthington Cylinders,” and that it was only produced by Defendant after the parties stipulated to entry of the Protective Order at issue. ECF No. 282-1, Declaration of Jason J. Granskog in support of Defendant’s application to file documents under seal, ¶¶ 3-4. Defendant declares that it maintains these documents as confidential because “a competitor or potential competitor could seek to capitalize on this information and attempt to make these products to sell themselves.” Id. ¶ 5. Plaintiff does not expressly oppose the motion to file Exhibits J and K under seal.<sup>3</sup>

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<sup>3</sup> Although Plaintiff does not expressly oppose Defendant’s motion to file Exhibits J and K under seal, he makes two conflicting claims about them. In his supplemental declaration, Plaintiff first claims that Exhibits J and K are no longer protected documents because “the protective order

1 Plaintiff asks the Court to seal Exhibit A to Plaintiff's declaration in reply to Defendant's  
2 Opposition of the motion to terminate the Protective Order. ECF No. 288. In support, Plaintiff  
3 claims that the document is subject to a protective order in an active case in Illinois. Id. at 2;  
4 ECF No. 288-1, Declaration of Andrew W. Shalaby in support of motion to file Exhibit A under  
5 seal, ¶¶ 2-3. Defendant did not file an opposition to Plaintiff's motion to file Exhibit A under  
6 seal.

7 Having reviewed the motions to file documents under seal [ECF Nos. 282 and 288], and  
8 finding good cause, the Court **GRANTS** the motions and **ORDERS** that (1) Defendant's Exhibits  
9 J and K to the declaration of Jason J. Granskog in support of its Opposition, and (2) Exhibit A to  
10 Plaintiff's declaration in reply to Defendant's Opposition to the motion to terminate the Protective  
11 Order be filed under seal.

### 12 **III. MOTION TO TERMINATE THE PROTECTIVE ORDER**

#### 13 **A. Parties' Arguments**

14 Plaintiff asks the Court to terminate the Protective Order, claiming that it "is obsolete, the  
15 company 'BernzOmatic' is no longer in existence, and the product has long since been recalled  
16 and is no longer produced." ECF No. 278 at 1-2. Plaintiff claims that he is an attorney and only  
17 recently learned of the existence of the Protective Order during his representation of a plaintiff  
18 in an Illinois case for injuries allegedly caused by the same torch product and fuel cylinder that  
19 were at issue in the instant case.<sup>4</sup> Id. Plaintiff declares that on October 21, 2017, counsel for  
20 third party defendant Worthington objected to the use of a drawing in the Illinois case, claiming  
21 that it is a violation of the Protective Order for the instant terminated case. ECF No. 278-2,  
22 Declaration of Andrew W. Shalaby in Support of Motion to Terminate Protective Order ("Shalaby  
23 Decl. Motion") ¶ 1; ECF No. 278-3. Plaintiff asks the Court to terminate the Protective Order "so  
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26 states that it is intended to protect trade secrets to prevent harm in competition, and  
27 Bernzomatic ceased its existence long ago, while the product itself is no longer produced either."  
28 ECF No. 287 at 3. However, in Plaintiff's motion to file documents under seal, he claims that  
Exhibits J and K are "indeed protected." ECF No. 288 at 2.

<sup>4</sup> Plaintiff represents Kurtis Bailey in Bailey v. Bernzomatic, et al., Case No. 16-cv-7548, in United  
States District Court in Illinois. ECF No. 278-2 at 1; Oppo. at 1 n.1.

1 that it does not pose an obstacle or impediment to discovery in the several other fuel cylinder  
2 failure cases pending, and forthcoming, against Worthington Industries and Worthington  
3 Cylinder Corporation and affiliates.” Shalaby Decl. Motion ¶ 10. Plaintiff explains that in addition  
4 to the Illinois case, he represents a plaintiff, Mr. Shadbolt, who has a case pending in Canada  
5 alleging that a “cylinder failed and caused injury and severe property damage in Canada while  
6 being used by [] Mr. Shadbolt.”<sup>5</sup> See ECF No. 278-2, Shalaby Decl. Motion, ¶ 8.

7 Defendant argues that Plaintiff’s Motion should be denied for several reasons. Oppo.  
8 at 1. First, Defendant argues that Plaintiff has unclean hands because he violated the Protective  
9 Order at issue by failing to return protected documents when this action ended and by emailing  
10 protected documents obtained during this action to a Federal District Court in Illinois in an active  
11 case in which he is the attorney for the plaintiff. Id. at 2-3; ECF No. 281-1, Declaration of Jason  
12 J. Granskog in support of Defendant’s Opposition (“Granskog Decl.”), ¶¶ 6-7. Second, Defendant  
13 argues that Plaintiff’s claim that he did not know the Protective Order existed is false, as he has  
14 both actual and constructive knowledge of the Protective Order. Oppo. at 2; see also  
15 ECF No. 281-2, Declaration of William T. Nagle (“Nagle Decl.”), ¶¶ 2-4. Third, Defendant argues  
16 that Plaintiff’s Motion violates a Prefiling Order in a related case, which was “issued to prevent  
17 [Plaintiff] from further arguing his personal injury claims.” Oppo. at 2; see also  
18 Nagle Decl. ¶ 5, Exh. E. Finally, Defendant argues that termination of the Protective Order is  
19 unnecessary because Plaintiff can seek documents from Defendant through discovery in the  
20 active case in Illinois, which has its own confidentiality order authorizing protection for  
21 proprietary documents. Oppo. at 2; Granskog Decl. ¶ 11. In addition to these arguments in  
22 opposition, Defendant asks the Court to impose sanctions against Plaintiff for violating the  
23 Protective Order, altering a document covered by the Protective Order to “make it appear as  
24 though the document was not protected,” and violating the Prefiling Order in a related case by  
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26 <sup>5</sup> Plaintiff also explains that there is litigation alleging injuries from fuel cylinder failures in Los  
27 Angeles, New York, and in other cases “posted on the Pacer system.” ECF No. 278-2, Shalaby  
28 Decl. Motion, ¶¶ 5-7, 9. Plaintiff does not state that he is counsel of record on any of those  
cases. See id.

1 “rehashing his personal injury case.” Oppo. at 6-10. Defendant argues that sanctions are  
2 appropriate under Federal Rule of Civil Procedure 37 and 28 U.S.C. § 1927. Id.

3 In reply, Plaintiff declares that he did not represent himself during this case, that his  
4 attorneys did not tell him about the Protective Order and did not give him a copy, and that he  
5 did not sign the Protective Order. ECF No. 286, Declaration of Andrew W. Shalaby in Reply to  
6 Responses to Motion to Terminate Protective Order (“Shalaby Decl. Reply”), ¶ 2; see also  
7 ECF No. 10 at 1-3. Plaintiff denies allegations that he “altered documents and circulated them  
8 in violation of the subject protective order of this Court” or the Illinois court. ECF No. 287,  
9 Supplemental Declaration of Andrew W. Shalaby in Reply to Responses to Motion to Terminate  
10 Protective Order (“Shalaby Supp. Decl. Reply”), ¶ 1. Plaintiff also denies distributing “any  
11 protected documents to any third party,” except for one protected document from the instant  
12 case to court staff in the Illinois case. Id. ¶¶ 3-4. Plaintiff claims that the protected document  
13 was produced by Bernzomatic, but because Bernzomatic ceased its existence in 2011, the  
14 document is no longer protected. Id. ¶ 4; see also ECF No. 289 at 1-2.

### 15 **B. Legal Standard**

16 Protective orders in discovery are governed by Federal Rule of Civil Procedure 26(c),  
17 which states that a “court may, for good cause, issue an order to protect a party or person from  
18 annoyance, embarrassment, oppression, or undue burden or expense, including . . . requiring  
19 that a trade secret or other confidential research, development, or commercial information not  
20 be revealed or revealed only in a specified way.” Fed. R. Civ. P. 26(c)(1)(G). “The Supreme  
21 Court has interpreted Federal Rule of Civil Procedure 26(c) as conferring ‘broad discretion on  
22 the trial court to decide when a protective order is appropriate and what degree of protection is  
23 required.’” In re Static Random Access Memory (SRAM) Antitrust Litig., No. 07-MD-01819 CW,  
24 2011 WL 5193479, at \*4 (N.D. Cal. Nov. 1, 2011) (quoting Seattle Times Co. v. Rhinehart,  
25 467 U.S. 20, 36 (1984)).

26 Generally, the Ninth Circuit “strongly favors access to discovery materials to meet the  
27 needs of parties engaged in collateral litigation.” Foltz v. State Farm Mut. Auto. Ins. Co.,  
28 331 F.3d 1122, 1131 (9th Cir. 2003) (citing Beckman Indus., Inc. v. Int’l Ins. Co.,

1 966 F.2d 470, 475 (9th Cir. 1992). "Allowing the fruits of one litigation to facilitate preparation  
2 in other cases advances the interests of judicial economy by avoiding the wasteful duplication  
3 of discovery." Id. (citing Beckman, 966 F.2d at 475). "Where reasonable restrictions on  
4 collateral disclosure will continue to protect an affected party's legitimate interests in privacy, a  
5 collateral litigant's request to the issuing court to modify an otherwise proper protective order  
6 so that collateral litigants are not precluded from obtaining relevant material should generally  
7 be granted." Id. at 1132 (citing Beckman, 966 F.2d at 475; Olympic Refining Co. v. Carter,  
8 332 F.2d 260, 265-66 (9th Cir. 1964)). However, courts should not grant a request for  
9 modification automatically. See id. The Ninth Circuit's two-part test requires that the party  
10 seeking modification must first "demonstrate the relevance of the protected discovery to the  
11 collateral proceedings and its general discoverability therein." Id. Relevance is determined by  
12 the "degree of overlap in facts, parties, and issues between the suit covered by the protective  
13 order and the collateral proceedings." Id. (internal quotations and citation omitted).

14 The district court that issued the protective order only is required to make a rough  
15 estimate of relevance determining "whether the protective order will bar the collateral litigants  
16 from gaining access to the discovery already conducted." Id. at 1132-33. "Even if the issuing  
17 court modifies the protective order, it does not decide whether the collateral litigants will  
18 ultimately obtain the discovery materials" because "ultimate discoverability of specific materials"  
19 must be resolved by the collateral court. Id. at 1133; see also The Sherwin-Williams Co. v. JB  
20 Collision Servs., Inc., No. 13-CV-1946-LAB (WVG), 2017 WL 6027005, at \*2 n.1 (S.D. Cal.  
21 Dec. 5, 2017) ("The case in this District has been closed for nearly two years and is not the  
22 proper forum in which to wage battles over the relevancy of *specific* items of discovery in an  
23 active case pending in another district. The narrow issue before this Court is whether the  
24 Protective Order should be modified such that such a battle can even be waged or whether the  
25 Protective Order should remain unmodified and thus serve as a barrier to requests for protected  
26 discovery."); Stokes v. Life Ins. Co. of N. Am., Nov. CIV 06-00411-S-LMB, 2009 WL 8397036,  
27 at \*3 (D. Idaho Aug. 31, 2009) ("In other words, the court's ruling [to modify the protective  
28 order] does not allow movants to directly access the underlying documents. It simply establishes

1 that no party may prevent movants from obtaining access as a matter of course, for use in the  
2 collateral actions.” (quoting In re Dynamic Random Access Memory (DRAM) Antitrust Litig.,  
3 No. M 02-1486 PJH, 2008 WL 4191780, at \*3 (N.D. Cal. Sept. 10, 2008))).

4 If the court finds sufficient relevancy, it must then “weigh the countervailing reliance  
5 interest of the party opposing modification against the policy of avoiding duplicative discovery.”  
6 Foltz, 331 F.3d at 1133. When there is an interest in maintaining the secrecy of confidential  
7 information such as “trade secrets, financial information, and third-party medical or personnel  
8 information,” the court should recognize that such information can be protected by placing the  
9 collateral litigants “under the same use and disclosure restrictions contained in the original  
10 protective order.” Id. at 1134.

### 11 **C. Discussion**

#### 12 **1. The Protective Order**

13 First, the Court finds that contrary to Plaintiff’s contentions, he is bound by the Protective  
14 Order in the instant closed case, pursuant to the express terms of the agreement. Although  
15 Plaintiff did not sign the Protective Order, his attorney—acting as his agent in this litigation—did  
16 sign it. ECF No. 10 at 1-3; see Link v. Wabash R. Co., 370 U.S. 626, 633-34 (1962) (finding that  
17 in “our system of representative litigation . . . each party is deemed bound by the acts of his  
18 lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon  
19 the attorney” (internal quotations and citation omitted)). The Protective Order was signed by  
20 Mark D. Epstein, attorney for Plaintiffs Andrew Shalaby and Sonia Dunn-Ruiz on  
21 November 28, 2007, thus binding Mr. Epstein and Plaintiffs to the terms of the Protective Order.  
22 ECF No. 10 at 1-3; see Link, 370 U.S. at 633-34.

23 The Protective Order designates trade secrets and other confidential information  
24 produced in the action by Bernzomatic, Worthington, and Western as Protected Documents.  
25 ECF No. 10 at 1-2, 5-6. The Protective Order preserves and maintains the confidentiality of the  
26 Protected Documents by, inter alia, mandating that the parties may use the Protected  
27 Documents “solely in connection with this litigation, and not for any business, competitive, or  
28 governmental purpose or function, and such information shall not be disclosed to anyone except



as otherwise provided herein,” absent a specific order by the Court. Id. at 6. Plaintiffs themselves are part of the small group of people—referred to as Qualified Persons—who are allowed access to the Protected Documents. Id. at 7. All Protected Documents and copies were required to be returned to the producing party’s counsel after the conclusion of the action. Id. at 9. The Protective Order also states the following:

11. Plaintiffs, their counsel, and experts or any other person retained by Plaintiffs to assist in the preparation of this action shall not under any circumstances sell, offer for sale, advertise, or publicize either the contents of the Protected Documents or the fact that Plaintiffs have obtained [Bernzomatic, Worthington, or Western] confidential documents.

12. After termination of this litigation, the provisions of this Order shall continue to be binding, except with respect to those documents and information that became a matter of public record. This Court retains and shall have jurisdiction over the parties and recipients of the Protected Documents for enforcement of the provisions of this Order following termination of this litigation.

Id.

The Court also finds that the Protective Order is still in effect and enforceable. The plain language of paragraph 12 of the Protective Order clearly and expressly provides for the Protective Order to remain binding even after termination of the action. Id. Plaintiff’s unsupported argument that the Protective Order is “obsolete” and “serves no valid purpose” because defendant Bernzomatic no longer exists is unconvincing. Motion at 1-2; ECF No. 278 at 1-2. Bernzomatic was not the only entity that relied on the Protective Order to protect its trade secrets and other confidential information produced during the litigation of this case because Worthington and Western also became protected by and bound to the Protective Order. Furthermore, even if Bernzomatic no longer exists, that is not a condition that would render a Protected Document unprotected. ECF No. 10 at 9. Instead, the Protective Order provides that even after litigation has ended, the provisions remain binding “except with respect to those documents and information that became a matter of public record.” Id. Plaintiff provides no evidence that Bernzomatic’s Protected Documents have become a matter of public record.

Accordingly, the Court **DENIES** Plaintiff’s motion to terminate the Protective Order on

1 the grounds that it is obsolete or because the product has been recalled or is no longer in  
2 production. The Court also explicitly finds that Plaintiff is a party to the Protective Order and  
3 must comply with its terms. Accordingly, Plaintiff is **ORDERED** to return all Protected  
4 Documents covered by this Court's Protective Order to Defendant's counsel on or before  
5 **February 2, 2018**.<sup>6</sup> See ECF No. 10.

## 6 **2. Modification of the Protective Order**

7 Plaintiff also asks the Court to terminate the Protective Order on the ground that it may  
8 impede discovery in other cases, pending or anticipated. Motion at 2. In analyzing motions  
9 challenging existing protective orders to facilitate discovery in collateral cases, the Ninth Circuit  
10 has set forth a two-part test. See Blum v. Merrill Lynch Pierce Fenner & Smith Inc.,  
11 712 F.3d 1349, 1354-55 (9th Cir. 2013) (citing Foltz v. State Farm Mut. Auto. Ins. Co.,  
12 331 F.3d 1122, 1132-34 (9th Cir. 2003)). Although neither party specifically discusses the  
13 relevant test, this Court will do so.

14 First, Plaintiff must "demonstrate the relevance of the protected discovery to the collateral  
15 proceedings and its general discoverability therein." Foltz, 331 F.3d at 1132. Here, Plaintiff  
16 merely states there are other cases pending against Defendant with similar allegations of fuel  
17 cylinder failure. Shalaby Decl. Motion ¶¶ 5-10. However, Plaintiff provides few details regarding  
18 the identified collateral cases. Id. Moreover, Plaintiff does not discuss the scope of the Protected  
19 Documents covered by this Court's Protective Order, nor does he address the relevance of all of  
20 the covered Protected Documents to the pending or anticipated litigation.<sup>7</sup> See ECF No. 278;  
21 Shalaby Decl. Motion. Plaintiff also does not explain his standing to request that covered  
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23 <sup>6</sup> Although Bernzomatic no longer exists, its former counsel in this matter, Shelley Hurwitz,  
24 declared that the assets of Bernzomatic were sold to Worthington Industries in 2011.  
25 ECF No. 285 ¶ 11. Worthington is the sole Defendant opposing Plaintiff's motion to terminate  
26 the Protective Order. Therefore, Plaintiff shall return all Protected Documents produced by  
27 either Bernzomatic or Worthington to counsel for Defendant Worthington Industries, Inc.

28 <sup>7</sup> For example, on October 21, 2017, in the Illinois case, Defendant sent an email to Plaintiff  
objecting to the use of three drawings submitted by Plaintiff, alleging that they were not only  
subject to this Court's Protective Order, but also "not a photo of the subject cylinder."  
ECF No. 281-1 at 27 (Exhibit D); Granskog Decl. ¶¶ 6-7.

1 Protected Documents be made available for litigation in which he is neither a party nor an  
2 attorney of record. Shalaby Decl. Motion ¶¶ 5-10. Finally, Plaintiff does not explain how the  
3 existing Protective Order prevents Plaintiff or any other litigant from obtaining relevant discovery  
4 from Defendants in other litigation. See ECF No. 278; Shalaby Decl. Motion.

5 Despite the minimal information presented to the Court, the Court finds that Plaintiff has  
6 established sufficient relevance to justify modifying the Protective Order solely to prohibit  
7 Defendant from using this Court's Protective Order as a shield to bar discovery requests in the  
8 Illinois case and in other pending or anticipated litigation against Defendants involving injuries  
9 allegedly caused by the same torch product and fuel cylinder in which Plaintiff is counsel of  
10 record.<sup>8</sup> See Foltz, 331 F.3d at 1132-33 (finding that relevance is determined by the "degree of  
11 overlap in facts, parties, and issues between the suit covered by the protective order and the  
12 collateral proceedings" (internal citation omitted)). The Court makes no finding regarding the  
13 relevance of any specific documents to any other case. While Plaintiff has not established that  
14 the instant Protective Order prevents him from obtaining requested discovery in the Illinois case  
15 (or any other case), the Court will consider the second part of the legal standard. See id. (finding  
16 that the district court should consider "whether the protective order will bar the collateral  
17 litigants from gaining access to the discovery already conducted").

18 The second step requires the Court to weigh "the countervailing reliance interest of the  
19 party opposing modification against the policy of avoiding duplicative discovery." Id. at 1133.  
20 Here, Defendant only briefly addresses its reliance interest by claiming that in regard to the  
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23 <sup>8</sup> Plaintiff has not presented evidence indicating that Defendant has attempted to use this Court's  
24 Protective Order to prevent Plaintiff from obtaining discovery in other cases. The Court  
25 recognizes that Defendant cited this Protective Order to object to the use of certain documents  
26 *produced by Plaintiff* in the Illinois case. See ECF No. 281-1 at 27 (Exhibit D);  
27 Granskog Decl. ¶¶ 6-7. However, Defendant did not use this Protective Order as a shield to  
28 prevent discovery because, according to Defendant, Plaintiff "has not even tried to obtain the  
same documents in [the Illinois case] by propounding discovery" despite the fact that the Illinois  
court entered a Confidentiality Order on November 2, 2017, providing protection for proprietary  
documents. See Oppo. at 10; Oppo. at 2; Granskog Decl. ¶ 11; ECF No. 281-1 at 39-51  
(Exh. G).

Protective Order at issue, “the terms of the Order were carefully considered and negotiated by the parties. The Order was then approved by the Court and relied on by the defendants. Worthington continues to rely on its protection.” Oppo. at 6. The Court notes that the Protective Order does not deem all discovery to be protected, but only documents containing trade secrets and other confidential research, development, and commercial information. ECF No. 10 ¶ 1. In opposition, Plaintiff argues that the Protective Order is obsolete because Bernzomatic is no longer in existence and the product is no longer being produced. ECF No. 287 at 3-4. The Court rejects Plaintiff’s argument, finding that all of the Defendants in the instant case placed significant reliance on the Protective Order when they produced their trade secrets and other confidential information. It is therefore reasonable for Defendants to expect the Protected Documents to be barred from public disclosure. See In re Static Random Access Memory (SRAM) Antitrust Litig., 2011 WL 5193479 at \*5–6 (“Among the goals furthered by protective orders is reducing conflict over discovery and facilitating the flow of information through discovery . . . . [C]hanging the ground rules later is to be avoided because protective orders that cannot be relied upon will not foster cooperation through discovery.” (quoting Foltz 331 F.3d at 1137) (internal quotations and citation omitted)).

By seeking to terminate the Protective Order, Plaintiff seeks to be free to disclose the Protected Documents to anyone and to use the Protected Documents in any way he chooses. The Court finds this request improper and unsupported because it would remove any “reasonable restrictions on collateral disclosure” and fail “to protect an affected party’s legitimate interests in privacy.” See Foltz, 331 F.3d at 1132 (internal citations omitted). The Court therefore **DENIES** Plaintiff’s motion to terminate the Protective Order on the basis that it impedes discovery in other litigation. The Court recognizes, however, that the policy of avoiding duplicative discovery also must be considered. The Court finds good cause to modify the Protective Order so it may not be used as a shield by Defendant to prevent access to otherwise discoverable material. See In re eBay Seller Antitrust Litig., No. C07-01882 JF (HRL), 2010 WL 2836815, at \*4 (N.D. Cal. July 19, 2010) (“[T]he protective order is modified to the extent that it may not be used as a shield by eBay to prevent Sawyer’s lawyers from obtaining

documents otherwise discoverable from eBay.”); In re Dynamic Random Access Memory (DRAM) Antitrust Litig., 2008 WL 4191780, at \*3 (“In other words, the court's ruling does not allow movants to directly access the underlying documents. It simply establishes that no party may prevent movants from obtaining access as a matter of course, for use in the collateral actions.”). Whether the protected material is discoverable in Plaintiff’s other cases is a question for those courts. See Foltz, 331 F.3d at 1133 (“If the protective order is modified, the collateral courts may freely control the discovery processes in the controversies before them without running up against the protective order of another court.”); see also The Sherwin-Williams Co. v. JB Collision Servs., Inc., 2017 WL 6027005, at \*2 n.1 (“The case in this District has been closed for nearly two years and is not the proper forum in which to wage battles over the relevancy of *specific* items of discovery in an active case pending in another district.”). However, Plaintiff must still request the documents in the collateral proceedings and, if necessary, the courts in those districts will have to determine relevancy. See Stokes, 2009 WL 8397036, at \*3 (“Any such access [is] permissible, however, only after the collateral courts have decided upon the proper scope of discovery . . . in those cases (and resolved any discovery objections that arise), and only to the extent and in accordance with the scope permitted by those courts.” (internal citation omitted)).

For all of these reasons, the Court **DENIES** the Motion to Terminate the Protective Order, and **ORDERS** the Protective Order to be modified to prohibit Defendants from using the instant Protective Order as a shield to prevent production of otherwise discoverable materials. The remaining terms and provisions of the Protective Order are unchanged. See ECF No. 10. In particular, the Court reminds the parties that Protected Documents “shall be used by the parties solely in connection with [the underlying] litigation, and not for any business, competitive, or governmental purpose or function, and such information shall not be disclosed to anyone except as otherwise provided herein.” ECF No. 10 ¶ 3.

### 3. Sanctions

Federal Rule of Civil Procedure 37 authorizes the court to exercise its discretion to impose a wide range of sanctions when a party fails to comply with the rules of discovery or with court

orders enforcing those rules. Fed. R. Civ. P. 37(b)(2). Under 28 U.S.C. § 1927, “[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.” 28 U.S.C. § 1927.

The Court finds that Plaintiff’s motion is not entirely without merit as the Court has slightly modified the Protective Order. The Court also finds that the Prefiling Order discussed by both parties is irrelevant to the instant motion and does not warrant the imposition of sanctions. Finally, while the Court finds that Plaintiff is subject to the Protective Order, should have returned all Protected Documents to Defendants after this case ended, and may not use Protected Documents in any manner not authorized by the Protective Order, the Court finds that Plaintiff’s proven conduct does not warrant the imposition of sanctions. The Court also finds Defendant’s allegation that Plaintiff altered Defendant’s Protected Document in an attempt to conceal its protected status is too speculative to warrant sanctions. Oppo. at 5-6; Granskog Decl. ¶¶ 15-16. Therefore, the Court exercises its discretion and **DECLINES** to impose sanctions against Plaintiff.

#### **IV. CONCLUSION**

For the foregoing reasons, the Court:

(1) **GRANTS** Defendant’s motion to file documents under seal and **ORDERS** Exhibits J and K to the declaration of Jason J. Granskog in support of its opposition to the motion to terminate the protective order to be filed under seal;

(2) **GRANTS** Plaintiff’s motion to file documents under seal and **ORDERS** Exhibit A to Plaintiff’s declaration in reply to Defendant’s opposition to the motion to terminate the protective order to be filed under seal;

(3) **DENIES** Plaintiff’s motion to terminate the Protective Order;

(4) **ORDERS** Plaintiff to immediately comply with the Protective Order, which includes returning all Protected Documents to counsel for Defendants on or before **February 2, 2018**;

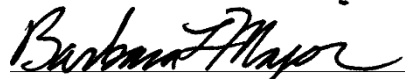
(5) **ORDERS** the Protective Order to be modified only to the extent that it may not be

1 used as a shield by the parties to prevent production of otherwise discoverable materials. In all  
2 other respects, the terms and provisions of the Protective Order are unchanged; and

3 (6) **DENIES** Defendant's request to impose monetary sanctions on Plaintiff.

4 **IT IS HEREBY ORDERED.**

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6 Dated: 1/19/2018

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8 Hon. Barbara L. Major  
9 United States Magistrate Judge  
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